Supreme Court, U.S.
FILED
09-453 OCT 13 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN E. CARTER, Petitioner

vs.

LEON C. BURNS, JR., ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John E. Carter
Petitioner *pro se*
NECXU13 – 00097766
Northeast Correctional Complex
5249 Highway 67 West
Post Office Box 5000
Mountain City, Tennessee 37683-5000

QUESTIONS PRESENTED

1. Is a state required under *Fiore v. White* and the Due Process Clause of the Fourteenth Amendment to apply a state supreme court clarification of state substantive law to a defendant's final case on collateral review to guard against the conviction and continued incarceration of the defendant without proving the elements of that statute beyond a reasonable doubt; and, if so, did the Sixth Circuit Federal Courts flout due process in sanctioning the State of Tennessee's failure to provide a collateral review remedy – either by establishing a new procedure, or by utilizing an already existing procedure – in which the Tennessee Supreme Court's *State v. Brown* clarification of the substantive statute under which Petitioner was convicted will be applied to his final case, when applying the *Brown* clarification establishes, from the face of the record, that Petitioner's conduct did not violate an element of the criminal statute, as properly interpreted, as it applies to his case?

2. Did the Sixth Circuit Federal Courts flout due process and evade granting 42 U.S.C. § 1983 relief by summarily dismissing Petitioner's complaint under the Prison Litigation and Reform Act upon unsustainable grounds and in complete disregard to this Supreme Court's precedent?

LIST OF PARTIES

1. JOHN E. CARTER, Plaintiff/Petitioner, is currently incarcerated in the Tennessee Department of Correction, Northeast Correctional Complex, 5249 Highway 67 West, Post Office Box 5000, Mountain City, Tennessee 37683-5000.
2. LEON C. BURNS JR., Respondent/Defendant, is a Criminal Court Judge for the 13th Judicial District of Tennessee, 228 East Board Street Suite 204, Cookeville, Tennessee 38501-3380.
3. LYNN W. BROWN, Respondent/Defendant, is a Criminal Court Judge for the 1st Judicial District of Tennessee, 713 East Elk Avenue, Elizabethton, Tennessee 37643.
4. JERRY LYNN SMITH, Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, Supreme Court Building Suite 200, 401 Seventh Avenue North, Nashville, Tennessee 37219-1407.
5. ROBERT WILEY WEDEMEYER, Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, Supreme Court Building Suite 220, 401 Seventh Avenue North, Nashville, Tennessee 37219-1407.
6. THOMAS T. WOODALL, Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, 103 Sylvis Street, Post Office Box 1075, Dickson Tennessee 37055.
7. DAVID H. WELLES, Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, Supreme Court Building Suite 208, 401 Seventh Avenue North, Nashville, Tennessee 37219-1407.
8. GARY R. WADE, Respondent/Defendant, is a

Judge on the Court of Criminal Appeals for Tennessee, 505 Main Street Suite 200, Knoxville, Tennessee 37901-0444.

9. NORMA MCGEE OGLE, Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, 505 Main Street, Knoxville, Tennessee 37901-0444.
10. JAMES CURWOOD WITT JR., Respondent/Defendant, is a Judge on the Court of Criminal Appeals for Tennessee, 138 College Street, Madisonville, Tennessee 37354.
11. FRANK F. DRAWOTA III, Respondent/Defendant, is Chief Justice of the Supreme Court of Tennessee, Supreme Court Building Suite 318, 401 Seventh Avenue North, Nashville, Tennessee 37219-1407.
12. E. RILEY ANDERSON, Respondent/Defendant, is a Justice of the Supreme Court of Tennessee, 505 Main Street, Post Office Box 444, Knoxville, Tennessee 37901-0444.
13. WILLIAM M. BARKER, Respondent/Defendant, is a Justice of the Supreme Court of Tennessee, State Office Building Suite 410, 540 McCallie Avenue, Chattanooga, Tennessee 47402-2096.
14. ADOLPHO A. BIRCH JR., Respondent/Defendant, is a Justice of the Supreme Court of Tennessee, Supreme Court Building Suite 304, 401 Seventh Avenue North, Nashville, Tennessee 37219-1407.
15. JANICE M. HOLDER, Respondent/Defendant, is a Justice of the Supreme Court of Tennessee, Pembroke Square Suite 310, 119 South Main Street, Memphis, Tennessee 38103.

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A. The Sixth Circuit Court of Appeals' Order affirming the district court is found at John E. Carter v. Leon C. Burns, Jr., et al., No. 08-6373 (6th Cir., April 28, 2009), and is cited as (Appeals Court, *___; Appendix A).

B. The Sixth Circuit Court of Appeals' Order denying timely petition for rehearing and rehearing en banc is found at John E. Carter v. Leon C. Burns, Jr., et al., No. 08-6373 (6th Cir., April 28, 2009), petition for rehearing and rehearing en banc denied, (6th Cir., July 21, 2009), and is cited as (Appendix B).

C. The District Court Order dismissing Petitioner's § 1983 complaint and accompanying Magistrate Judge Report and Recommendation is found at John E. Carter v. Leon C. Burns, Jr., et al., No. 03-07-0597, 2008 WL 4525422 (M.D.Tenn., October 2, 2008), and is cited as (District Court, *___; Appendix C).

D. The Tennessee court opinion related to Petitioner's pre-Fiore habeas corpus proceeding is found at John E. Carter v. Howard Carlton, Warden, No. E2000-00406-CCA-R3-PC, 2001 WL 170878 (Tenn.Crim.App., February 22, 2001), perm. to app. denied, (Tenn., September 17, 2001), and is cited as (Appendix D).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date of the judgment of the United States Circuit Court of Appeals for the Sixth Circuit sought to be appealed is April 28, 2009.

The date the United States Circuit Court of Appeals for the Sixth Circuit denied Petitioner's timely petition for rehearing and rehearing en banc is July 21, 2009.

This Court's certiorari jurisdiction is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

> the Government for a redress of grievances.

United States Constitution, First Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Eighth Amendment

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Constitution, Fourteenth Amendment

STATEMENT OF THE CASE[1]

On April 4, 1983, I was convicted under Tenn.Code Ann. § 39-2402 (1977) for the premeditated, deliberate first-degree murder of my paternal grandparents, and sentenced to consecutive terms of life imprisonment. (Tr. 2000-2002)

Regrettably, I am the individual who

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[1] Your *pro se* incarcerated Petitioner appreciates that the Court wishes *certiorari* petitions to be brief and concise. However, this is a complicated case, and it was made even more complicated by the defective treatment my case received in the Sixth Circuit Federal Courts – in fact, over one-half of this petition is dedicated to the manufactured, unsustainable summary dismissal of the lower courts (see Question Two). I promise the Court, I worked extremely hard at making this petition as concise as possible while supplying the Court with all the information necessary for fair consideration of the issues presented. *See* Sup.Ct. Rule 14.2 ("All contentions in support of a petition ... shall be set out in the body of the petition.").

committed these horrible acts. (Tr. 1303-1307)

However, from the time of this senseless crime to this very day, I have maintained my innocence to first-degree murder, while accepting responsibility for the lesser-included offense of second-degree murder. [2]

In fact, at trial, my entire and only defense was centered on the question of whether I possessed, and had the capacity to possess, the § 39-2402 *mens rea* of "premeditation" and "deliberation" during the commission of the offense. (Tr. 1914-1944)

Unfortunately, at the time of my trial, Tennessee law was so distorted against me, I never had the opportunity to properly defend myself against the charge of first-degree murder.

At the time of my offense, the Tennessee Supreme Court had repeatedly held that the "premeditation" and "deliberation" elements of first-degree murder (*i.e.*, the offense first-degree murder itself) could be established if the prosecution proved that the victim was killed through the use of "repeated blows or shots." *Houston v. State*, 593 S.W.2d 267, 273 (Tenn. 1981) (finding that "repeated blows and shots" were sufficient proof, in and of itself, to establish both premeditation and deliberation elements of first-degree murder).

And, at trial, the only evidence presented and argued by the prosecution as proof of "deliberation" was the undeniable fact that the victims were killed

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[2] In the State of Tennessee, the difference between first- and second-degree murder is substantial; the minimum sentence for first-degree murder is life imprisonment, while the maximum sentence for second-degree murder is 25 years.

through the use of "repeated blows or shots":

> GEN. FOSTER: Nobody knows what he was thinking, but you can infer that from his actions; from his actions, what he intended. For instance, when he puts a gun to somebody's head, cocks the trigger and pulls it, cocks the hammer back and pulls the trigger, you can infer he intended to shoot that gun, and he intended to kill because it's a deadly weapon. *And when he did it three times, as he did to [the victim], cocking the hammer back and shooting at point blank range, you can infer that he intended to kill [the victim] and that the killing was deliberate and with cool purpose.* You can find that it was willful. It wasn't an accident. *He did it deliberately... And for [the victim] to receive those three bullet wounds ... it's got to be cocked and fired three times, a conscious, deliberate effort to kill.* (emphasis added).

(Tr. 1903)

On July 2, 1990, my § 39-2402 first-degree murder convictions, consecutive terms of life imprisonment, and state post-conviction proceeding proceeded to final determination. (Complaint, ¶ 23-35)

On June 2, 1992, the Tennessee Supreme Court clarified the "premeditation" and "deliberation" elements in § 39-2402 in *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992):

> If it was not clear from the opinions emanating from this [Tennessee Supreme] Court within the last half-century, it is now abundantly

> clear that the deliberation necessary to establish first-degree murder cannot be formed in an instant. It requires proof ... that the homicide was "committed with 'a cool purpose' and without passion or provocation," which would reduce the offense either to second-degree murder or to manslaughter, respectively.

Brown, 836 S.W.2d at 537-43. (Complaint, ¶ 17)

In *Brown,* the Court pointed to and overruled *Houston v. State* (and similar cases), recognizing that "repeated blows or shots" is not sufficient proof of first-degree murder:

> Logically, of course, the fact that repeated blows (or shots) were inflicted on the victim is not sufficient, by itself, to establish first-degree murder. Repeated blows can be delivered in the heat of passion, with no design or reflection.... [T]he courts of Tennessee should adhere to long-established rules of law and that we should abandon the modern tendency to muddle the line between first- and second-degree murder. Certainly, more than the mere fact of "repeated blows" must be shown to establish first-degree murder, and to the extent that the opinions in *Houston* and *Martin* can be read to hold otherwise, they are expressly overruled.

Brown, 836 S.W.2d at 542-543. (Complaint, ¶ 17)

Because the ONLY evidence presented to prove "deliberation" was the evidence of "repeated blows or shots," if *Brown* were applied to my case, the face of the record requires reversal of my convictions under the Federal Due Process Clause

because my conduct did not violate § 39-2402, as properly interpreted, as it applies to my case. [3] *State v. Brown*, 836 S.W.2d at 538 ("'[W]illfulness, malice and premeditation may exist without that cool purpose contemplated by the statute as construed,' and if so, the result is second-degree murder, not first.").

However, because the Tennessee Supreme Court's *Brown* decision does not create a **new** rule of

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[3] In my motion under 28 U.S.C. § 2244(b), my Federal Public Defenders asserted my "actual innocence" as follows:

> Carter can meet this [actual innocence] standard because the "deliberation" element of his first-degree murder conviction was premised on evidence of repeated shots. Carter notes that the ... prosecutor's closing argument ... used a few bits of physical evidence as a springboard to present the jury with a wholly speculative theory as to how Carter might have plotted out the killings and might have gone about performing them in cold blood. But that theory is unacceptable because it is so speculative. At bottom, the State was permitted to prove deliberation by the simple fact of repeated shots. Even drawing inferences in favor of the State, the evidence it cited cannot be deemed to support its speculative theory beyond a reasonable doubt, and ultimately Carter stands convicted of a "deliberate" murder based on the evidence of repeated shots.... Each morning the State of Tennessee sends fresh guards to its Northeast Correctional Complex and renews its forcible detention of John Carter. Each morning Carter must question whether that detention, which may consume virtually his entire adult life, is legitimate under an accurate application of the Tennessee murder statute. Since the Tennessee Supreme Court has corrected misinterpretations of that statute, no court has reviewed his conviction's legitimacy.

In re John E. Carter, Case No. 07-5155 (6th Cir. June 14, 2007).

law, neither state nor federal law provides a collateral review procedure in which the *Brown* clarification of § 39-2402 can be applied to my final case. [4] (See below, outlining my repeated attempts at state and federal collateral review.)

There is a fundamental defect presented by a situation in which a later arising fully cognizable clarification of substantive law establishes my innocence – that appears upon the face of the record – but, through no fault of my own, I have no source of judicial redress. (Compliant, ¶ 42)

Since the Antiterrorism and Effective Death Penalty Act of 1996 does not authorize a challenge to the inadequacy of state postconviction procedures, or authorizes any appeal following the denial of a motion under 28 U.S.C. § 2244(b), I filed a 42 U.S.C. § 1983 declaratory relief suit because, I believe, that the State of Tennessee is constitutionally mandated to provide me with a post-conviction/collateral review procedure in which the *Brown* clarification of the substantive § 39-2402 will be applied to my final case, to guard against my conviction and

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[4] While theoretically an original writ of habeas corpus is available, that jurisdiction is rarely exercised. S.Ct.R. 20.4(a) (original writs are "rarely granted"). It cannot be held, therefore, that an original writ will provide me with the constitutional protections necessary under the facts of this case. *See In re Davis*, 2009 WL 2486475 at *2 (2009) (Scalia, J., dissenting) ("Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996.").

continued incarceration without proving the elements of § 39-2402 beyond a reasonable doubt. U.S.Const.Amends. 8 & 14; *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Herrera v. Collins*, 506 U.S. 390 (1993). (Complaint, ¶ 20)

And this Supreme Court agrees!

In *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*), Fiore had been convicted of a crime, but after his conviction became final, the Pennsylvania Supreme Court interpreted the relevant law and made it clear that Fiore's conduct was not within the scope of the criminal statute. *Id.* at 226.

Although this interpretation removed any illegality from Fiore's conduct, the Pennsylvania courts on collateral review refused to examine Fiore's case because it was time-barred and not subject to an exception. *Id.* at 227.

Fiore applied for federal habeas relief; and eventually, this Supreme Court granted *certiorari* in his case. *Id.*

However, before making its determination, this Court presented a state-law question to the Pennsylvania Supreme Court, asking the scope of the interpretation of the applicable law. *Id.* at 226.

In response, the Pennsylvania Supreme Court made clear that its interpretation did not create new law, but merely represented the proper interpretation of the law at the time Fiore's conviction became final. *Id.*

Relying on this answer, in an unanimous three-page *per curiam* opinion, this Supreme Court found a clear violation of the Due Process Clause of the Fourteenth Amendment, which forbids a state to

convict and incarcerate a person of a crime without proving the elements of that crime beyond a reasonable doubt. *Id.* at 228-229 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)). *See also Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*).

My case under *certiorari* review, is controlled by *Fiore v. White*.

For example, both state and federal courts – including the Sixth Circuit Federal Courts below (District Court, **7, 10 n.6; Appendix C) – have recognized that *Brown* represents a clarification of the substantive § 39-2402, and represents the proper interpretation of § 39-2402 on the date my convictions became final. *John E. Carter v. Howard Carlton, Warden*, 2001 WL 170878, at *3 (Tenn.Crim.App. 2001), *perm. to app. denied*, (Tenn. 2001) (Appendix D); *Miller v State*, 54 S.W.3d 743, 747 (Tenn. 2001). (Complaint, ¶ 18)

Pursuant to *Fiore*, therefore, *Brown* presents no issue of retroactivity; the Federal Due Process Clause requires the *Brown* clarification of § 39-2402 be applied to my final case on collateral review, to guard against my conviction and continued incarceration without proving the elements of § 39-2402 beyond a reasonable doubt. U.S.Const.Amend. 14; *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam); Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*). (Complaint, ¶¶ 19, 40)

However, again, because the Tennessee Supreme Court *Brown* clarification does not establish a new rule of constitutional law, neither state or federal law provides a collateral review

procedure in which the *Brown* clarification of § 39-2402 can be applied to my final case.

For example, armed with *Fiore*, I have attempted to have the *Brown* clarification applied by my final case on collateral review under *Fiore* and the Due Process Clause in at least nine (9) separate state and federal proceedings; from these proceedings, there is no doubt that I have no remedy when I am actually innocent of the first-degree murder of § 39-2402:

• Although pre-*Fiore*, at the time of the *Brown* opinion I was before the Sixth Circuit Federal Courts on original habeas corpus proceeding; when I motioned the Court of Appeals to amend my habeas petition to include a sufficiency of the evidence claim under *Jackson v. Virginia* based upon *Brown*, my motion was denied without explication. *John E. Carter v. Neil Rone, Warden*, No. 93-5499 (6th Cir., December 2, 1993).

• My Tenn.Code Ann. § 40-30-117(a) motion to reopen my prior post-conviction proceeding was dismissed because the *Brown* clarification is not cognizable in a § 40-30-117(a) proceeding. *John E. Carter v. State of Tennessee*, No. M2003-00750-CCA-R28-CO (Tenn.Crim.App., June 9, 2003), *perm. to app. denied*, (Tenn., October 27, 2003). (Complaint, ¶ 27)

• My motion to recall the mandate related to my direct appeal seeking the application of the *Brown* clarification was summarily dismissed without explanation. *State of Tennessee v. John E. Carter*, No. M2005-0543-CCA-OT-CO (Tenn.Crim.App., December 28, 2005), *perm. to app. denied*, (Tenn., June 26, 2006).

• My motion to recall the mandate related to

my original post-conviction proceeding seeking the application of the *Brown* clarification was summarily dismissed without explanation. *John E. Carter v. State of Tennessee*, No. M2005-02542-CCA-OT-CO (Tenn.Crim.App., December 28, 2005), *perm. to app. denied*, (Tenn., June 26, 2006).

• My 28 U.S.C. § 2244(b) application filed in the Sixth Circuit Court of Appeals was dismissed because the clarification of state substantive law is not cognizable in a § 2244(b) proceeding. *In re John E. Carter*, No. 05-5315 (6th Cir., October 26, 2005). (Complaint, ¶ 22)

• My Federal Rule Civil Procedure 60(b)(6) motion filed in the District Court was treated as a § 2244(b) application and transferred to the Sixth Circuit Court of Appeals where it was dismissed because the clarification of state substantive law is not cognizable in a § 2244(b) proceeding. *In re John E. Carter*, No. 05-5774 (6th Cir., October 31, 2005). (Complaint, ¶ 22)

• My "Untitled Motion/Petition" filed in the District Court was treated as a § 2244(b) application and transferred to the Sixth Circuit Court of Appeals where it was dismissed because the clarification of state substantive law is not cognizable in a § 2244(b) proceeding. *In re John E. Carter*, No. 07-5155 (6th Cir., June 14, 2007).

• My "Untitled Motion/Petition" filed in the Criminal Court for White County Tennessee (see below) was summarily treated as a petition for writ of *error coram nobis* and – without any statute of limitations due process analysis, and without providing me any opportunity to present evidence in support of a statute of limitations due process claim – was dismissed as "untimely" because the "Untitled"

pleading was not filed within one (1) year of my conviction even though *Brown* was decided nine (9) years after my conviction. *John E. Carter v. State of Tennessee*, 2006 WL 119673 (Tenn.Crim.App., February 22, 2006), *perm. to app. denied*, (Tenn., May 30, 2006). (Complaint, ¶¶ 28-33)

• My "Untitled Motion/Petition" filed in the Criminal Court for Johnson County Tennessee (see below) was summarily treated as a petition for writ of *habeas corpus* and dismissed because, although "constitutionally based," my request for the application of *Brown* is not cognizable in a *habeas corpus* proceeding. *John E. Carter v. State of Tennessee*, 2005 WL 2487977 (Tenn.Crim.App., October 7, 2005), *perm. to app. denied*, (Tenn., January 30, 2006). (Complaint, ¶¶ 34-39)

Forming the bases of this 42 U.S.C. § 1983 proceeding, are my two (2) separate but identical "Untitled Motion/Petition" pleadings I filed in the Criminal Court for White County Tennessee (the court of my original conviction) on April 7, 2005, [5] and in the Criminal Court for Johnson County Tennessee (the court closest to my place of incarceration) on April 12, 2005. (Complaint, ¶¶ 28-39)

In both these "Untitled Motion/Petition" pleadings, I asserted:

• Because *Brown* represents a clarification of § 39-2402, and represents the proper interpretation of § 39-2402 on the date my convictions became final, *Brown* represents no issue of retroactivity; the State of Tennessee is constitutionally mandated to provide

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[5] This date is different than the date reached by the Sixth Circuit Federal Courts. (Appendix C)

me with a post-conviction/collateral review procedure in which the *Brown* clarification will be applied to my final case under *Fiore* and the Due Process Clause of the Fourteenth Amendment, to guard against my conviction and continued incarceration without proving the elements of § 39-2402 beyond a reasonable doubt. (Complaint, ¶¶ 28-39)

• I explained that I am not sure if Tennessee law provides a post-conviction/collateral review procedure following the clarification of substantive law. (Complaint, ¶¶ 28-39)

• And explained that, as such, I was filing an "Untitled Motion/Petition" pleading requesting that the named state court justices/judges defendants convert this pleading in accordance with the relief sought; and/or asking the named defendants to exercise their authority and establish a post-conviction/collateral review procedure that will allow the *Brown* clarification of § 39-2402 to be applied to my final case in accordance with *Fiore* and the Due Process Clause. [6] (Complaint, ¶¶ 28-39)

However, the named state court

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[6] In the State of Tennessee, when an issue arises for which no procedure is specifically prescribed for – like in my case – the named state court justices/judges defendants have the statutory and inherent authority to adopt all appropriate rules of practice and procedure that will rectify any deficient procedure(s). *See Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (collecting cases); Tenn.Code Ann. § 40-30-118 (2003) (post-conviction proceedings). And as I pointed out in my complaint, the named defendants have repeatedly cut through procedural barriers to reach constitutional claims not explicitly authorized under Tennessee post-conviction/collateral review law. (Complaint, ¶¶ 51-53) *See May v. Carlton*, 245 S.W.2d 340, 348 (Tenn. 2008) (habeas corpus case); *Van Tran v. State*, 66 S.W.2d 790, 799 (Tenn. 2001) (post-conviction proceeding).

justices/judges defendants refused to exercise their inherent and statutory authority and promulgate a rule or procedure that will allow for the application of the *Brown* clarification to my final case. (Complaint, ¶¶ 28-39)

Instead, the named state court defendants treated the White County pleading as a petition for writ of error *coram nobis* and found the petition to be "untimely"; and treated the Johnson County pleading as a petition for writ of *habeas corpus* and found my request for the application of *Brown*, although constitutionally based, not to be cognizable in a habeas corpus proceeding. (Complaint, ¶¶ 28-39)

On May 19, 2007, [7] I filed a 42 U.S.C. § 1983 complaint naming the state court justices/judges as defendants – attacking the statutes facially, and the named state court justices/judges defendants in their roles as enforcers and administrators because of their authority (and their refusal to exercise their authority) to promulgate post-conviction/collateral review procedures – in their official capacities, under the color of state law, seeking declaratory relief under *Fiore* and the Due Process Clause, to wit:

> Because the Due Process Clause of the Fourteenth Amendment requires that the Tennessee Supreme Court clarification of the substantive Tenn.Code Ann. § 39-2402 (1977) in *State v. Brown*, 836 S.W.2d 530, 537-543 (Tenn. 1992), be applied to Petitioner's final convictions, and because federal law fails to

[7] There is a conflict in this date between the District Court (Appendix C) and the Appeals Court (Appendix A). Petitioner asserted that the date reached by the District Court – May 19, 2007 – represents the proper filing date of his complaint.

> provide Petitioner federal judicial review and redress following the clarification of state substantive law, Tennessee statutes governing collateral review -- Tenn.Code Ann. §§ 29-21-107, 40-26-105, 40-30-107, 40-30-117 -- facially ... flouts the [First,] Eighth and Fourteenth Amendments by depriving Petitioner all opportunity for judicial review and redress of his later arising fully cognizable *Brown* based federal constitutional claims that have resulted in the conviction of one who is factually innocent of the first-degree murder of § 39-2402 [to guard against the conviction and continued incarceration of Petitioner without proving the elements of § 39-2402 beyond a reasonable doubt].

(Complaint, pp. 1-2)

On May 31, 2007, on initial screening under the Prison Litigation and Reform Act (PLRA), the District Court dismissed the complaint under the *Rooker-Feldman* doctrine.

On March 18, 2008, the Court of Appeals reversed, finding that my factual challenge is not barred under the *Rooker-Feldman* doctrine. *Carter v. Burns*, 524 F.3d 796 (6th Cir. 2008).

On October 2, 2008, on remand, the District Court again dismissed my complaint during initial screening under the PLRA.

In dismissing my complaint, the District Court repeatedly recognized that *Brown* represents a clarification of the substantive § 39-2402; but then found that "plaintiff has no constitutional right to post-conviction/collateral review" under *Fiore*, or any other provision of our Federal Constitution: [8]

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[8] In making this "no constitutional right" determination, the

"It is true, as the petitioner alleges, that historically the case law has not been uniform in its treatment of the definitions of premeditation and deliberation. *See e.g., State v. Brown*, 836 S.W.2d 530, 540-43 (Tenn. 1992) (discussing various approaches to the analysis of premeditation and deliberation). Although the supreme court has since addressed the ambiguity by clarifying the distinction between the two elements, *see generally id.* at 543..." ... *Bunkley v. Florida*, 528 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003) (actual change in the law at issue, not a "mere clarification" as was the case under *Brown*)...

* * *

... the plaintiff has no constitutional right to post-conviction/collateral review ... the plaintiff cannot support a claim that Tennessee's post-conviction/collateral review statutes violate his constitutional rights where no right to post-conviction/collateral review exists in the first place... [n]one of the cases to which the plaintiff cites in support of his argument ... establishes that he has a constitutional right to challenge his convictions under *Brown* in a state post-conviction/collateral review proceeding. (citations omitted) (emphasis added)

(District Court, ** 2-3, 7-9, 10 n.6; Appendix C)

Sixth Circuit Federal Courts rejected my substantive due process claim (Compliant, ¶ 48); procedural due process claim (Complaint, ¶ 49); equal protection claims (Complaint, ¶¶ 50-53); access to the courts claim (Complaint, ¶ 54); cruel and unusual punishment claim (Complaint, ¶ 55); among others claims (Complaint, ¶¶ 47-48).

The District Court (see Question Two) then applied this "no constitutional right" determination to find that I lacked standing to pursue the instant complaint, that my complaint was time-barred, and that my claims against the individually-named defendants are frivolous. (District Court; Appendix C)

On April 28, 2009, the Appeals Courts' mandatory PLRA *de novo* review resulted in a three (3) sentence summary affirmance. (Appeals Court; Appendix A)

On June 21, 2009, the Sixth Circuit Court of Appeals denied my timely petition for rehearing and rehearing *en banc*. (Appendix B)

This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

"A State cannot, consistently with the Federal Due Process Clause, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit." *Fiore v. White*, 531 U.S. 225, 228-229 (2001) (*per curiam*).

This case falls squarely at the intersection of a defendant's right under *Fiore v. White* to have a state's highest court's clarification of a state substantive law applied to his final case on collateral review; the State of Tennessee's refusal to provide a collateral review procedure for the application of the *State v. Brown* clarification; and the Sixth Circuit Federal Courts sanctioning of the State of Tennessee's wanting procedure.

Certiorari should be GRANTED:

• Certiorari should be granted because this case represents a substantive departure from the fundamental principle "that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. at 228-229.

Because the clarification of state substantive law does not create a new rule of constitutional law, neither state nor federal law provides a collateral review procedure in which the *Brown* clarification will be applied to my final case under *Fiore* and the Due Process Clause. (Complaint, ¶¶ 23-39)

Consequently, since the *Brown* clarification, no court – state or federal – has reviewed the legitimacy of my convictions under *Fiore* to guard against my conviction and continued incarceration without proving the elements of § 39-2402 beyond a reasonable doubt. (Complaint, ¶ 21)

As such, I am being forced to serve consecutive terms of life imprisonment – the rest of my life – when I am actually innocent of the first-degree murder of § 39-2402 without any source of judicial redress. (Complaint, ¶ 44)

This is not the way our system is suppose to work: "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 328, 341 (1995). (Complaint, ¶ 41)

• Certiorari should be granted because my predicament is not isolated only to me.

Numerous Tennessee defendants have sought to have the *Brown* clarification applied to their final

cases on state and federal collateral review; yet I have not found one single case in which the *Brown* clarification has actually been applied.

These cases highlight the judicial barriers created by the State of Tennessee and the Sixth Circuit Federal Courts; judicial barriers in direct negation of the constitutional principles this Court applied in *Fiore*. Cf. *e.g., Black v. Bell*, 181 F.Supp.2d 832, 871 (M.D.Tenn. 2001) ("No federal issues are implicated and no federal question is presented in determining whether [*Brown*] is to be applied retroactively."); *Alley v. Bell*, 101 F.Supp.2d 588, 657 (M.D.Tenn. 2000) ("[R]eliance on *Brown* simply does not raise a cognizable federal claim, but merely a claim under state substantive law."); *Miller v. State*, 54 S.W.2d 743, 747-48 (Tenn. 2001) ("[W]e conclude that *Brown* did not create a new state constitutional rule, that the decision is not to be given retroactive application, and that use of the abandoned jury instruction did not infringe upon or implicate any constitutional right.").

• Certiorari should be granted because this case – and those similarly situated – represent a split between the Sixth Circuit Federal Courts/State of Tennessee and this Supreme Court and every other state and federal court in this nation.

For example, every other state and federal court that has reviewed the issue has found that *Fiore* constitutionally mandates a collateral review procedure following a state supreme court clarification of state substantive law. *See e.g., Bunkley v. Florida*, 538 U.S. 835, 840-41 (2003) (*per curiam*); *Dixon v. Miller*, 293 F.3d 74, 79 (2nd Cir. 2002); *Goosman v. Iowa*, 764 N.W.2d 539, 544 (Iowa

2009); *In re Hinton*, 152 P.3d 801, 860 (Wash. 2004); *Clem v. Nevada*, 81 P.3d 521, 527 (Nev. 2003); *Luke v. Battle*, 565 S.E.2d 816, 820 (Ga. 2002); *Florida v. Klayman*, 835 So.2d 248, 253 (Fla. 2002); *Agee v. Russell*, 751 N.E.2d 1043, 1047 (Ohio 2001).

• Certiorari should be granted to rectify the contradictory opinions stemming from this Supreme Court.

For example, if *Fiore* mandates the State of Tennessee to apply the *Brown* clarification of § 39-2402 to final cases on collateral review, there are contradictory opinions from this Supreme Court on this issue. *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (*per curiam*) (A State cannot, consistently with the Federal Due Process Clause, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit.); cf. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (States have no obligation to provide postconviction relief for collateral attack upon criminal judgements).

• Although this Supreme Court has repeatedly acknowledged that the question whether inadequate state postconviction procedures violate the Constitution's Due Process, Equal Protection, and Suspension Clauses is a substantial issue worthy of the Court's *certiorari* review, the Court has consistently declined to address the question because, *inter alia*, "if the State ... should ... deny all remedies to individuals imprisoned within the state in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrongs." *Woods v. Nierstheimer*, 328 U.S. 211, 216 (1948). *See Case v.*

Nebraska, 381 U.S. 336, 346 (1965) (Brennan, J., concurring).

Because the AEDPA fails to provide a federal remedy for state defendants following the clarification of state substantive law (see above), the longstanding federal habeas corpus backstop for deficient state postconviction proceedings has been removed, and increases the importance of Supreme Court review of the question pretermitted in *Woods* and *Case* and undermines the Supreme Court's previously asserted reason for pretermitting the question. Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, Fifth Ed., § 7.1b, pp. 343-344 (2001).

Certiorari should be granted to clarify the need for a state postconviction procedure post-AEDPA.

• Certiorari should be granted for any other reason(s) justified by law or the facts of this case.

QUESTION ONE

Is a state required under *Fiore v. White* and the Due Process Clause of the Fourteenth Amendment to apply a state supreme court clarification of state substantive law to a defendant's final case on collateral review to guard against the conviction and continued incarceration of the defendant without proving the elements of that statute beyond a reasonable doubt; and, if so, did the Sixth Circuit Federal Courts flout due process in sanctioning the State of Tennessee's failure to

provide a collateral review remedy – either by establishing a new procedure, or by utilizing an already existing procedure – in which the Tennessee Supreme Court's *State v. Brown* clarification of the substantive statute under which Petitioner was convicted will be applied to his final case, when applying the *Brown* clarification establishes, from the face of the record, that Petitioner's conduct did not violate an element of the criminal statute, as properly interpreted, as it applies to his case?

"A State cannot, consistently with the Federal Due Process Clause, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit." *Fiore v. White*, 531 U.S. 225, 228-229 (2001) (*per curiam*).

Fiore can ONLY be interpreted that constitutional due process requires the availability of post-conviction/collateral redress when – like in this case (Complaint ¶ 20) – a state's highest court clarifies the provisions of a state criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's conviction became final:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. *See Jackson*, 443 U.S., at 316, 99 S.Ct. 2781; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). (emphasis added)

Fiore v. White, 531 U.S. at 228-29. *See also, Bunkley v Florida*, 538 U.S. 835 (2003) (*per curiam*).

Justice SCALIA, writing for a unanimous Court, recognized that, under *Fiore*, a clarification of a state substantive law may have "consequences" upon final criminal judgments:

> A change in the interpretation of a substantive statute may have consequences for cases that have already reached final judgment, particularly in the criminal context. *See Bousley v. United States*, 523 U.S. 614, 619-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); cf. *Fiore v. White*, 531 U.S. 225, 228-229, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) (*per curiam*).

Gonzalez v. Crosby, 545 U.S. 524, 536 n.9 (2005).

Whatever these "consequences" may be, there can be no consequences without a collateral review procedure.

The Sixth Circuits Federal Courts found that Petitioner has "no constitutional right to post-conviction/collateral review" under *Fiore*, or any other provision of our Federal Constitution. (District Court, ** 2-3, 7-9, 10 n.6; Appendix C) (Appeals Court; Appendix A)

A. Constitutional Right Under *Fiore v. White*

This "no constitutional right" determination cannot be reconciled with *Fiore*.

Pursuant to *Fiore*, because *Brown* represents a clarification of the substantive § 39-2402, and represents the proper interpretation of § 39-2402 on the date Petitioner's convictions became final, *Brown* presents no issue of retroactivity; the Due Process

Clause of the Fourteenth Amendment requires that the *Brown* clarification of § 39-2402 be applied to Petitioner's final convictions on collateral review, to guard against the conviction and continued incarceration of Petitioner without proving the elements of § 39-2402 beyond a reasonable doubt. U.S.Const.Amend. 14; *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*); *Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*). (Complaint, ¶¶ 19, 40)

If *Fiore* mandates that *Brown* be applied to Petitioner's final case, *Fiore* must also mandate a post-conviction/collateral review procedure.

B. Tennessee's Already Existing Post-Conviction/Collateral Review Procedures

Even if *Fiore* does not establish an independent constitutional right to a postconviction procedure this does not end our query.

Because the State of Tennessee has chosen to provide postconviction procedures, these procedures must comply with constitutional mandates.

Therefore, in order for the Sixth Circuit Federal Courts' "no constitutional right" determination to pass scrutiny, this determination -- *i.e.*, the State's failure to provide a post-conviction/collateral review procedure under *Fiore* and the Due Process Clause -- must not offend "some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental," or offend a "recognized principle of fundamental fairness in operation." *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2320 (2009) (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

Beyond doubt, the Sixth Circuit Federal

Courts sanctioning of the State of Tennessee's failure to provide Petitioner with a post-conviction/collateral review procedure under *Fiore*:

• Denies Petitioner the "beyond a reasonable doubt" determination during his criminal trial, offending "[a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 446-48 (1992). (Complaint, ¶ 49)

• Substantially increases the risk of an unjust conviction and imprisonment and cannot be justified, demonstrating "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). (Complaint, ¶ 48)

• And bars defendants from making a strong and legitimate claim of actual innocence following the clarification of state substantive law, in violation of the cruel and unusual punishment provision of the Eighth Amendment. *Osborne*, 129 S.Ct. at 2321-22 (citing *Herrera v. Collins*, 506 U.S. 390, 398-417 (1993)). (Complaint, ¶ 55)

C. Conclusion

The Sixth Circuit Federal Courts' "no constitutional right to post-conviction/collateral review" determination cannot be reconciled with the due process principles this Court applied in *Fiore*.

Certiorari should be granted.

QUESTION TWO

Did the Sixth Circuit Federal Courts flout

due process and evade granting 42 U.S.C. § 1983 relief by summarily dismissing Petitioner's complaint under the Prison Litigation and Reform Act upon unsustainable grounds and in complete disregard to this Supreme Court's precedent?

If *Fiore* mandates the State of Tennessee apply the *Brown* clarification of § 39-2402 to my final case on collateral review, the grounds upon which the Sixth Circuit Federal Courts summarily dismissed my complaint are unsustainable, and contrary to relevant opinions of this Supreme Court.

Fiore establishes, under the Due Process Clause of the Fourteenth Amendment, a liberty interest in having the *Brown* clarification of § 39-2402 applied to my final case on collateral review, and my release from my unlawful convictions and incarceration. *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam); Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*). (Complaint, ¶¶ 19, 40)

However, once the Sixth Circuit Federal Courts determined that I have "no constitutional right to post-conviction/collateral review" under *Fiore* or any other provision of our constitution, any liberty interest I have was lost, and left my complaint subject to summary dismissal upon the very grounds found by the lower courts. (Appendix A, C)

In addition, the grounds upon which the Sixth Circuit Federal Courts summarily dismissed my complaint are questionable at best.

A fair reading of the of the District Court opinion clearly establishes that the Court did

nothing more than **MANUFACTURE** a way to deny relief, in **COMPLETE DISREGARD** to precedent as established by this Supreme Court and the Sixth Circuit Appeals Court. (Appendix C)

And the Appeals Court's mandatory PLRA *de novo* review resulted in a three (3) sentence summary affirmance. (Appendix A)

Finally, it must be pointed out that, on original appeal, the three-judge panel that heard my appeal found my complaint to have enough merit to reverse the District Court's *Rooker-Feldman* dismissal and remand for further proceedings. *Carter v. Burns*, 524 F.3d 796 (6th Cir. 2008).

However, the later three-judge panel that heard my case found the same facts so wanting, that a three (3) sentence summary affirmance was appropriate. (Appendix A)

If *Fiore* mandates the State of Tennessee provide a post-conviction/collateral review procedure for the application of the *Brown* clarification to my final case, certiorari should be granted to review the PLRA summary dismissal of the Sixth Circuit Federal Courts.

* * *

A. Petitioner's Standing to Challenge the Statutes at Issue

Upon the most questionable of grounds, the Sixth Circuit Federal Courts found that Petitioner lacked standing to challenge the Tennessee post-conviction/collateral review statutes at issue. (District Court, ** 1, 6-8; Appendix C)

This finding is unsustainable as a misinterpretation/re-characterization of Petitioner's complaint, and because this finding cannot be reconciled with relevant decisions of this Supreme Court.

1.

There can be no doubt that the Tennessee collateral review statutes at issue have been applied to Petitioner – either through the application of the statute(s), or through the failure of the named defendants to promulgate a collateral review procedure – to deprive Petitioner of having the *Brown* clarification of § 39-2402 applied to his final case on collateral review, thereby depriving Petitioner from release from his unlawful convictions and incarceration. (Complaint ¶¶ 23-39)

While "past exposure to illegal conduct does not in itself show a present case or controversy[,]" the continued deprivation of Petitioner's liberty interest in obtaining release from his unlawful convictions and incarceration constitutes "continuing, present adverse effects" of past exposure to the illegal conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). *See Judice v. Vail*, 430 U.S. 327, 332-33 (1977) ("once the period of incarceration is served or the fined paid, the effect of the orders imposing a fine or commitment has expended itself," and the party lacks standing).

Petitioner has a sufficient "case or controversy" to establish Article III standing under Supreme Court precedent. *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001) (analyzing Article III standing when making a facial challenge to allegedly unconstitutional state statute).

2.

The Sixth Circuit Federal Courts found that Petitioner lacked standing because the issue forming the basis of this § 1983 action had been "previously addressed" in a pre-*Fiore* 2001 *Carter v. Carlton* state court proceeding. (District Court, **2, 6-8; Appendix C).

This determination is based upon a misinterpretation/re-characterization of Petitioner's complaint, is not supported by the face of the pre-*Fiore* 2001 *Carter v. Carlton* state court opinion (Appendix D), and cannot be sustained.

Giving Petitioner's *pro se* complaint a fair reading – and an interpretation to raise the strongest argument suggested – the statement in paragraph 21 of the complaint:

> 21. Since the clarification of § 39-2402 in *Brown*, no Tennessee court has reviewed the legitimacy of Petitioner's convictions.

should have been -- and is easily -- interpreted to mean:

> 21. Since the clarification of § 39-2402 in *Brown*, no Tennessee court has reviewed the legitimacy of Petitioner's convictions *under* Fiore *and the Due Process Clause of the Fourteenth Amendment to guard against the conviction and continued incarceration of Petitioner without proving the elements of § 39-2402 beyond a reasonable doubt.*

(Complaint, ¶ 21)

However, the Sixth Circuit Federal Courts grasped upon this one sentence of an unpopular Petitioner's unpopular complaint and substantially

changed – substantially expanding – the argument/question presented:

> The crux of the plaintiff's constitutional challenge to the statutes at issue is that, "[s]ince the *clarification* of § 39-2402 in *Brown*, no Tennessee court has reviewed the legitimacy of [his] convictions." ... The alleged "injury in fact" here is that Tennessee's post-conviction/collateral review statutes have barred the plaintiff from challenging his conviction post-*Brown*.

(District Court, **6-8; Appendix C)

Nowhere in this Supreme Court's declaration that *pro se* complaints are entitled to a liberal construction and must be construed broadly, and interpreted to raise the strongest argument that they suggest, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*), has this Court ever suggested that federal courts may change the meaning of a *pro se* complaint.

Based upon this misinterpretation/re-characterization, the District Court found that when the Tennessee Court of Criminal Appeals ruled upon the merits of Petitioner's "deficiency of the charge" claim in the pre-*Fiore* 2001 *Carter v. Carlton* state habeas corpus proceeding (Appendix D), that court also "previously addressed" the question of whether the *Brown* clarification of § 39-2402 requires reversal of Petitioner's convictions under *Fiore* and the Due Process Clause to guard against the conviction and continued incarceration of Petitioner without proving the elements of § 39-2402 beyond a reasonable doubt. [9]

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[9] This pre-*Fiore Carter v. Carlton* opinion is itself contrary to

The Sixth Circuit Federal Courts correctly pointed out that this pre-*Fiore* 2001 *Carter v. Carlton* proceeding was a state habeas corpus proceeding and the asserted "deficiency of the charge" claim received a ruling on the merits.

However, when Petitioner presented his § 1983 *Fiore* claim to the courts of Tennessee in his "Untitled Motion/Petition" pleading, this very same Tennessee Court of Criminal Appeals at Knoxville treated this pleading as a state habeas corpus proceeding, and then found that Petitioner's § 1983 *Fiore* claim is not cognizable in a state habeas corpus proceeding. (Complaint, ¶¶ 34-39)

Petitioner asserts that his § 1983 *Fiore* based claim and the claim presented in his pre-*Fiore* 2001 *Carter v. Carlton* state proceeding are not the same claim.

3.

The Sixth Circuit Federal Courts also found Petitioner's complaint was subject to dismissal as malicious, because Petitioner lied to the court when he claimed that his § 1983 *Fiore* had not been ruled upon in any Tennessee court. (District Court, **2, 6-8; Appendix C)

For the reasons stated above, Petitioner's § 1983 *Fiore* claim has not been "previously addressed" in any state court proceeding, and the Sixth Circuit Federal Courts' determination that Petitioner's complaint is subject to dismissal as malicious cannot be sustained.

Fiore. (Appendix, D)

B. Statute of Limitations

The Sixth Circuit Federal Courts found Petitioner's § 1983 complaint to be "untimely." (District Court, **2, 8-9; Appendix C) (Appeals Court, *3; Appendix A)

Again, this finding is unsustainable, and cannot be reconciled with relevant opinions from this Supreme Court.

1.

If the State of Tennessee is constitutionally mandated to apply the *Brown* clarification of § 39-2402 to Petitioner's final case on collateral review under *Fiore* and the Due Process Clause, in failing to apply the *Brown* clarification to Petitioner's final case – and release him from his unconstitutional convictions and incarceration – Petitioner is suffering from "continuing and accumulating harm" constituting a "continuing violation" under this Court's precedent. *Hanover Shoe Inc. v. United States Show Mach. Corp.*, 392 U.S. 481 (1968); *see also, Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) ("A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within the [statute of limitations period] of its enactment. '[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" (citation omitted)).

The Sixth Circuit Federal Courts' "untimely" determination cannot be sustained under this Supreme Court's "continuing violation" doctrine.

2.

According to the Sixth Circuit Federal Courts, the statute of limitations period starts to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Trzebuckowski v. City of Cleavland*, 319 F.3d 853, 857 (6th Cir. 2003).

Because the Tennessee Supreme Court has the inherent and statutory authority to provide a post-conviction/collateral review procedure, Petitioner did not know – and could not have known – that Tennessee law failed to provide a post-conviction/collateral review procedure in which the *Brown* clarification of § 39-2402 will be applied to Petitioner's final case under *Fiore* and the Due Process Clause until the Tennessee Supreme Court denied his Rule 11, Tenn.R.App.P., application for permission to appeal on his "Untitled Motion/Petition" on May 30, 2006.

Petitioner's complaint, filed May 17, 2007, is timely.

3.

Because Petitioner is only seeking declaratory relief, Petitioner's § 1983 complaint is govern by Tennessee's general ten-year statute of limitations codified at Tennessee Code Annotated § 28-3-110 (2000). *Hughley v. State*, 208 S.W.3d 388 (Tenn. 2006) (suits seeking only declaratory relief governed by § 28-3-110).

Any holding that Petitioner's complaint is "untimely" under Tennessee's one-year statute of limitations is contrary to *Wilson v. Garcia*, 471 U.S. 216 (1985) (recognizing that in § 1983 suits, courts

are to select the statute of limitations of the state cause of action "most appropriate" or "most analogous" to the plaintiff's actions).

4.

The lower courts raised and applied this affirmative statute of limitations defense *sua sponte* when reviewing Petitioner's § 1983 complaint under the initial screening provisions of the PLRA.

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court admonished this very same Sixth Circuit Court of Appeals for imposing heightened pleading standards on prisoner § 1983 cases. The pleading requirements in the Federal Rules do not compel a litigant to anticipate potential affirmative defenses and to affirmatively plead facts in avoidance of such defenses. *Jones v. Bock*, 549 U.S. at 214 (holding that PLRA does not require prisoners affirmatively to plead that they have exhausted their administrative remedies).

The *sua sponte* raising and dismissing Petitioner's complaint under the affirmative defense of statute of limitations during the initial screening provision of the PLRA is legal error and contrary to *Jones v. Bock*.

5.

Under *Younger* abstention, a federal court cannot exert jurisdiction if the plaintiff has an opportunity to present his federal claim in state proceedings, and abstention is appropriate unless state law clearly bars the interposition of the constitutional claims; moreover, once state court proceedings are started, a plaintiff must exhaust his

state remedies before instituting a constitutional challenge in federal court. *Younger v. Harris*, 401 U.S. 37 (1971)

Because Tennessee law did not -- and currently does not -- clearly bar the application of the *Brown* clarification at the time Petitioner's filed his "Untitled Motion/Petition" pleadings (see above), any holding that Petitioner's complaint is "untimely" because it was not filed within one-year of the filing of his "Untitled Motion/Petition" is contrary to the *Younger* abstention doctrine.

C. Petitioner's Challenge to the Constitutionality of Tennessee's Post-Conviction/Collateral Review Statutes

The Sixth Circuit district court found three (3) reasons as to why Petitioner's "claim that Tennessee's statutes governing post-conviction/collateral review violate his constitutional rights lacks an arguable basis in law or fact." (District Court, ** 2-3, 9-10; Appendix C)

None of the grounds relied upon by the Sixth Circuit Federal Courts can be reconciled with relevant decisions of this Supreme Court.

1.

The Sixth Circuit Federal Courts found that Petitioner has "no constitutional right to post-conviction/collateral review" under *Fiore*, or any other provision of our Federal Constitution.

For the reasons stated in Question One above, this determination cannot be reconciled with this Supreme Court's holding in *Fiore*.

2.

Citing *Bousley v. United States*, 523 U.S. 614 (1998), the Sixth Circuit Federal Courts held that Petitioner could not support a claim of actual or factual innocence.

Bousley holds just the opposite. *Id.* at 624.

Bousley stands for the proposition that following the *Brown* clarification of § 39-2402, it is possible for Petitioner to make a strong showing of actual innocence; as Petitioner repeatedly asserts in his § 1983 complaint. (Complaint, ¶¶ 20, 40)

3.

The Sixth Circuit Federal Courts found that "[n]one of the cases to which the plaintiff cites in support of his argument ... establishes that he has a constitutional right to challenge his convictions under *Brown* in a state post-conviction/collateral review proceeding based on a claim of legal or technical innocence."

On appeal, Petitioner asked the Sixth Circuit Court of Appeals to make a *de novo* review of the cases cited by Petitioner (District Court, *10 n.6; Appendix C), but, from the summary affirmance by the Circuit Court, Petitioner cannot determine if review of these cases was actually made.

Nevertheless, just last term, this Court assumed that a constitutional right to post-conviction/collateral review based upon a freestanding claim of actual innocence exists under the Eighth Amendment. *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2321-22 (2009) (citing *Herrera v. Collins*, 506 U.S. 390 (1993)).

D. The Named Defendants

The Sixth Circuit Federal Courts determined that none of the named state court justices/judges defendants are proper parties to this suit thus, "the plaintiff's claims against the named defendants to this action lack an arguable basis in law or fact." (District Court, **3-4, 10-11; Appendix C)

The Sixth Circuit Federal Courts' determination cannot be reconciled with relevant decisions of this Supreme Court.

1.

The Sixth Circuit Federal Courts tested and dismissed Petitioner's "official capacity" "declaratory relief" action under the public official qualified immunity defense of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The Sixth Circuit Federal Courts applied the WRONG standard.

Both Supreme Court and Sixth Circuit precedent clearly establish that the *Harlow* public official qualified immunity defense is not available in an official capacity § 1983 suit seeking only declaratory relief. *Harlow*, 457 U.S. at 806; *Davis v. Scherer*, 468 U.S. 183, 192-93 (1984); *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985).

2.

To the extent that the Sixth Circuit Federal Courts found that the named defendants are not the proper defendants because they are were simply "adjudicators" of the statutes at issue, this

represents yet another MISINTERPRETATION of Petitioner's complaint.

A fair reading of the complaint establishes that the named defendants are being sued as "enforcers" and as "administrators" of the post-conviction/collateral review statutes at issue. (Complaint)

Because the named defendants have all the authority to grant Petitioner all the relief he seeks (see Footnote 6 above), in refusing to promulgate a rule or procedure that allows the application of *Brown*, the named defendants were acting in an nonadjudicatory (enforcement/administrative) capacity which makes their involvement in this litigation more direct, and which gives them an institutional stake in this litigation's outcome; they are, therefore, the properly named as defendants in this "official capacity" "declaratory relief" § 1983 action. *Supreme Court of Virginia v. Consumers Union of America, Inc.*, 446 U.S. 719, 734-36 (1980), (Distinguishing between § 1983 suits against judges serving in their capacity as rule-makers as opposed to suits against judges in their role as adjudicators; finding that the Virginia Supreme Court had promulgated the state bar code and possessed independent authority to initiate disciplinary proceedings were sued in their capacity as rule-makers and enforcers.); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (judges proper defendants seeking the implementation of due process procedures in state judicial proceedings); *Georgevich v. Strauss*, 772 F.2d 1078, 1087-89 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986) (A class of prisoners properly sued judges who administered the parole power. The judges had the authority to grant the relief plaintiff's

sought by promulgating a rule that would provide prisoners with appropriate due process protections. Judges in that case were thus administering parole procedures rather than adjudicating a dispute between prisoners and third parties or some other state official charged with enforcing the statute.); *In re the Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) (Where a suit challenges "statutes related to the judicial process or statutes previously enforced by the particular judge against the plaintiff," judges are proper parties in § 1983 suit.).

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the holding of the Sixth Circuit Federal Courts.

John E. Carter
NECXU13 – 00097766
Northeast Correctional Complex
5249 Highway 67 West
Post Office Box 5000
Mountain City, Tennessee 37683-5000

No. 08-6373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN E. CARTER,	)	Filed: April 28, 2009
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	
	)	
	)	
LEON C. BURNS, JR., Criminal Court Judge, 13th Judicial District of Tennessee, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: GUY, ROGERS, and GRIFFIN, Circuit Judges.

*1 John E. Carter, a Tennessee prisoner proceeding pro se, appeals a district court order dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 43(a).

On May 31, 2007, Carter filed a complaint against the following Tennessee judges and justices: Thirteenth Judicial District Criminal Court Judge Leon C. Burns, Jr.; First Judicial District Criminal Court Judge Lynn W. Brown; Court of Criminal Appeals Judges Jerry Lynn Smith, Robert Wiley Wedemeyer, Thomas T. Woodall, David H. Welles, Norma McGee Ogles, and James Curwood Witt, Jr.: Court of Criminal Appeals Presiding Judge Gary R. Wade; Supreme Court Chief Justice Frank F. Drowota, III; and Supreme Court Justices E. Riley Anderson, William M. Barker, Adolpho A. Birch, Jr., and Janice M. Holder. Carter was convicted of two counts of premeditated first-degree murder for which he was sentenced to serve two consecutive life sentences. Carter *2 unsuccessfully appealed his convictions and sentences and unsuccessfully sought various forms of post-conviction relief in the Tennessee courts. The defendants ruled against Carter in his various post-conviction actions. Carter sued the defendants in their official capacities.

Relying upon the First, Eighth, and Fourteenth Amendments, Carter alleged that he has been denied access to the courts because "Tennessee law closes all opportunity to judicial review and redress," his "continued incarceration as a factually innocent prisoner is not consistent with the prohibition against cruel and unusual punishment," and his convictions violate the Due Process Clause "because [his] conduct did not violate an element of [Tennessee Code Annotated] § 39-2402, as properly interpreted." Carter explained that he was convicted pursuant to Tennessee's first-degree murder statute

formerly found in Tennessee Code Annotated § 39-2402. The Tennessee Supreme Court subsequently "*clarified* the 'premeditation' and 'deliberation' elements of § 39-2402 in *State v. Brown*, 836 S.W.2d 530- 537-43 (Tenn. 1992)." According to Carter, "the face of the record requires reversal of [his] convictions" in light of *Brown* because there is no evidence of the "deliberation" required to support his first-degree murder convictions.

Although he presented his *Brown*-based claim to the Tennessee courts in post-conviction proceedings, Carter alleged that "no Tennessee court has reviewed the legitimacy of [his] convictions." Therefore, through the instant action, Carter challenged the constitutionality of Tennessee Code Annotated §§ 29-21-107, 40-26-105, 40-30-107, and 40-30-117, which govern collateral review of criminal convictions, and alleged that such state statutes denied him "all opportunity for judicial review and redress of his later arising fully cognizable *Brown* based federal constitutional claims." Carter sought only declaratory relief in the form of "a declaratory order that the State of Tennessee is constitutionally mandated to provide [him] an adequate corrective process for the hearing and determination of his" constitutional claim based upon the Brown decision.

The district court dismissed Carter's complaint upon initial screening for lack of jurisdiction and failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915A(b) and subsequently denied reconsideration. On March 18, 2008, this court affirmed the district court's order in part, vacated the order in part, and remanded the case for

further proceedings.

*3 Upon remand, a magistrate judge filed a report recommending dismissal of Carter's complaint pursuant to the provisions of 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1) "for lack of standing/want of jurisdiction, and as both malicious and frivolous." Over Carter's objections, the district court modified, and then accepted and adopted, the magistrate judge's report and recommendation and dismissed the case.

Carter filed a timely appeal. He contends that the district court erroneously concluded that he lacked standing to pursue the instant complaint, that his complaint was time-barred, that he has no constitutional right to post-conviction relief, and that his claims against the individually-named defendants are frivolous. Carter requests oral argument, appointment of counsel, and certification of a question to the Tennessee Supreme Court.

We review de novo a district court order dismissing a complaint under §§ 1915(e) and 1915A. *Brown v. Bargery*, 207 F.3d 863, 866-67 (6th Cir. 2000). A complaint "is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

The district court properly dismissed Carter's complaint as without merit, and in any event untimely. Because these reasons why Carter's complaint was subject to dismissal have been fully explained by the district court, the issuance of a detailed opinion by this court would be duplicative

and would serve no useful purpose. We have considered all of the arguments raised by Carter in his appellate brief and conclude that they lack merit.

Accordingly, we deny all pending motions and affirm the district court's order. Rule 34(j)()(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

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No. 08-6373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN E. CARTER,	)	Filed: July 21, 2009
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	
	)	
	)	
LEON C. BURNS, JR.,	)	
Criminal Court Judge,	)	
13th Judicial District of	)	
Tennessee, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: GUY, ROGERS, and GRIFFIN, Circuit Judges.

*1 The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

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United States District Court,
M.D. Tennessee,
Nashville Division.

JOHN E. CARTER, Plaintiff,

v.

LEON C. BURNS, JR., et al., Defendants.
No. 3:07-0597.

Oct. 2, 2008. *

John E. Carter, Mountain City, TN, pro se.

MEMORANDUM and ORDER

ALETA A. TRAUGHER, District Judge.

*1 Presently pending before the court is the Magistrate Judge's Report and Recommendation (R & R) entered July 8, 2008 (Docket Entry No. 17), to which the plaintiff has filed timely objections (Docket Entry No. 20).

I. STANDARD OF REVIEW

Under Rule 72(b), Fed.R.Civ.P., and 28 U.S.C. § 636(b)(1), the court is required to make a de novo determination of the Magistrate Judge's recommendations to which objection has been made. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the Magistrate Judge with instructions.

II. ANALYSIS

A. The Magistrate Judge's Recommendations

The Magistrate Judge has recommended that this action be dismissed for lack of standing/want of jurisdiction, and for maliciousness and frivolity under 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). The Magistrate Judge has further recommended that any appeal not be certified under 28 U.S.C. § 1915(a)(3) as taken in good faith.

B. Plaintiff's Objections to the R & R

1. The plaintiff argues that the Magistrate Judge erred in conducting a "new full screening" of his complaint pursuant to §§ 1915(e)(2) and 1915A on remand, because "[i]t [wa]s not clear from the District Court's Order of referral, or the Sixth Circuit's instructions on remand, that the magistrate judge was to conduct a new full screening of the Plaintiff's complaint ..." (Docket Entry No. 20, ¶ II.A, p. 2)

The Magistrate Judge properly conducted a "full reassessment" of the plaintiff's complaint under §§ 1915(e)(2) and 1915A, because both statutes are applicable "at any time" during a proceeding. *See* 28 § U.S.C. § 1915(e)(2); *Benson v. O'Brian*, 179 F.3d 1014, 1016 (6th Cir. 1999) (the provisions of § 1915(e)(2) are applicable at "any time"*);* *Mcgore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997) (the provisions of §§ 1915(e)(2) and 1915A are "essentially identical"). A "full reassessment" also was warranted given that the complaint was originally dismissed under the *Rooker-Feldman* doctrine without benefit of review beyond that stated ground

for dismissal.

2. The plaintiff argues that "the magistrate judge based his entire report and recommendations upon an erroneous interpretation of Plaintiff's complaint." (Docket Entry No. 20, ¶ II.B, pp. 2-4) The court finds that the Magistrate Judge did not misinterpret the complaint.

3. The plaintiff argues that the Magistrate Judge erred in determining that the plaintiff did not have standing to challenge the Tennessee statutes at issue. (Docket Entry No. 20, ¶ III.C, pp. 4-12) The court has reviewed the record, including the R & R (Docket Entry No. 17, ¶ A, pp. 5-8) and the plaintiff's objections, and finds that the Magistrate Judge correctly concluded that the plaintiff does not have standing to bring this action for the reasons stated in the R & R. The plaintiff's attempt to parse his words in an attempt to portray the state proceeding in which his *Brown* claim was addressed by the Tennessee state court (Docket Entry No. 17, ¶ A, pp. 6-7) as having not considered his *Brown* claim is unpersuasive.

*2 **4.** The plaintiff argues that the Magistrate Judge erred in recommending that this action be dismissed as malicious because he lied to the court. (Docket Entry No. 20, ¶ III.D, pp. 12-13) The court has reviewed record, including the R & R (Docket Entry No. 17, ¶ A, pp. 5-8) and the plaintiff's objections.

The court finds that the Magistrate Judge did not err in concluding that the plaintiff has previously raised his *Brown* claim in a state collateral proceeding.

(Docket Entry No. 17, ¶ A, pp. 7-8) The Magistrate Judge's statement pertaining to the malicious nature of this claim (Docket Entry No. 17, ¶ A, p. 8) is modified as follows: "The plaintiff's complaint also is subject to dismissal as malicious because the plaintiff lied when he represented to the court that he has not been permitted to raise his claim under Brown in the Tennessee courts on collateral review." [FN 1]

> FN 1. This modification replaces the last sentence in the first complete paragraph on p. 8 in the R & R.

5. The plaintiff argues that the Magistrate Judge erred in concluding that this action should be dismissed for frivolity because it was brought beyond the one-year statute of limitations application to actions brought in Tennessee under 42 U.S.C. § 1983. (Docket Entry No. 20, ¶ III.E, pp. 13-20) The plaintiff objects to the Magistrate Judge having *sua sponte* raised the statute of limitations.

The Magistrate Judge did not err in raising the statute of limitations *sua sponte* under §§ 1915(e)(2) and 1915A, *see Watson v. Wayne County*, 90 Fed.App. 814 (6th Cir. 2004) (citing *Pino v. Ryan*, 49 F.3d 51, 53-54 (2nd Cir. 1995)); he did not err in recommending that the complaint be dismissed as frivolous because it was brought beyond the statute of limitations, *see Dellis v. Corrections Corporation of America*, 257 F.3d 508, 511 (6th Cir. 2001); and he did not err in concluding that equitable tolling should not be applied. (Docket Entry No. 17, ¶ B, pp. 8-10) The plaintiff's efforts to show that his complaint was timely based on the *Younger*

abstention doctrine, the alleged need to exhaust his *Brown* claim in sate court, and the continuing violation doctrine are, unavailing.

6. The plaintiff argues that the Magistrate Judge erred in concluding that he has no constitutional right to post-conviction/collateral review. (Docket Entry No. 20, ¶ III.F, pp. 10-12) and the plaintiff's objections, and finds that the Magistrate Judge did not err in concluding that the Tennessee statutes at issue do not violate his constitutional rights for the reasons stated in the R & R.

7. The plaintiff argues that the Magistrate Judge's treatment of his complaint is premised "solely" on the issue of technical/legal innocence. (Docket Entry No. 20, ¶ III.G, pp. 27-29) The plaintiff argues that his "complaint ***IS NOT***, premised on innocence ...." (emphasis in the original)

The R & R shows that the Magistrate Judge liberally construed the complaint to include a claim of innocence as grounds for establishing that he has right to raise his *Brown* claim on collateral review. (Docket Entry No. 17, ¶ C, pp. 11-12) Based on the language in the complaint, the Magistrate Judge's did not err in doing so.

***3** The court has reviewed the R & R (Docket Entry No. 17, ¶ C, pp. 10-12), and finds that the Magistrate's recommendation in this matter was not based "solely" whether the plaintiff claimed to be innocent. The Magistrate Judge's discussion pertaining to innocence was only to the extent that the complaint could be liberally construed to include

such a claim and, to the extent that it could, a claim of technical/legal innocence was insufficient to create a constitutional right to permit the plaintiff to raise his *Brown* claim on collateral review.

The court also finds that the Magistrate Judge's distinction between factual/actual and legal/technical innocence, and the relevance of that distinction to the plaintiff's complaint, is correct. Specifically, the plaintiff's argument that the Tennessee Supreme Court's clarification of "premeditation" and "deliberation" in *Brown* does not constitute actual/factual innocence, *i.e.,* that he did not kill the victims. *See e.g., Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (both cases clarifying the meaning "actual innocence" in the context of collateral proceedings). Absent a showing of "actual innocence," the plaintiff does not have a constitutional right to raise his *Brown* claim in a collateral proceeding.

8. The plaintiff argues that the Magistrate Judge erred in concluding that none of the cases cited by the plaintiff establishes that he has a constitutional right to challenge his convictions under *Brown* in a state post-conviction/collateral review proceeding. (Docket Entry No. 20, ¶ III.H, p. 29) The court has reviewed the cases at issue (Docket Entry No. 17, ¶ C, pp. 11-12 n. 6), and finds that the Magistrate Judge did not err in his conclusion that the cases cited do not establish a right to post-conviction/collateral review based on the plaintiff's claim of legal/technical innocence. The cases cited

that pertain to collateral review all require a showing of actual/factual innocence.

9. The plaintiff argues finally that the Magistrate Judge erred in determining that his claims against the named defendants to this action are frivolous. (Docket Entry No. 20, ¶ III.I, pp. 30-31) The plaintiff also argues that the claims against the named defendants should be liberally construed as claims against the State of Tennessee.

The defendants to this action, all sitting or former justices or judges, are named as defendants in their official capacities only. Although the Magistrate Judge did not say so specifically (Docket Entry No. 17, ¶ D., pp. 12-13), when a § 1983 plaintiff sues a state actor in their official capacity, the suit actually is against the political entity responsible for the actions of the named defendant. Thus, when the plaintiff sued the named defendants in this action in their official capacities, he actually was suing the State of Tennessee.

As the Magistrate Judge correctly concluded, to be entitled to declaratory relief in this action, the plaintiff must show that the named defendants acted knowingly or intentionally to violate the plaintiff's rights. The plaintiff's only allegation against the named defendants is that they acted within the scope of their judicial capacity. This is the only claim that can be imputed to the State.

*4 Inasmuch as an allegation that the named defendants acted solely within the scope of their judicial capacity would not give rise to a claim under

§ 1983 against those defendants, neither will such an allegation give rise to a claim under § 1983 against the State of Tennessee. Accordingly, the Magistrate Judge was correct in concluding that the plaintiff's claims against the defendants lacked an arguable basis in law or fact and, as such, should be dismissed as frivolous.

III. CONCLUSION

After reviewing the record, including the R & R and the plaintiff's objections in response thereto, the court is of the opinion that the Magistrate Judge's conclusions and recommendations are correct. Accordingly the R & R is **ACCEPTED** as modified herein, and **ADOPTED** as the findings of fact and conclusions of law of this court. For the reasons expressed therein, and in this opinion, the plaintiff's complaint is **DISMISSED** with prejudice.

It is so **ORDERED**.

REPORT AND RECOMMENDATION

JOHN S. BRYANT, District Judge.

To: The Honorable Aleta A. Trauger, United States District Judge

For the reasons explained below, the undersigned RECOMMENDS that this action be DISMISSED for lack of standing/want of jurisdiction, and as both malicious and frivolous under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). The undersigned further RECOMMENDS that any appeal NOT be certified under 28 U.S.C. § 1915(a)(3) as taken in

good faith.

I. INTRODUCTION

The district court dismissed this case on June 1, 2007 for want of jurisdiction under the *Rooker-Feldman* doctrine. (Docket Entry No. 3) The plaintiff's motion to reconsider was denied, and he appealed. (Docket Entry No. 5-6, 8)

On March 20, 2008, the Sixth Circuit affirmed the judgment of the district court in part, vacated it in part, and remanded the case for further proceedings. (Docket Entry No. 12) On remand, the Sixth Circuit instructed the district court to consider the plaintiff's challenge to the constitutionality of Tennessee statutes pertaining to post-conviction/collateral review.

The action was referred to the undersigned pursuant to 28 U.S.C. § 636(b) and Rule 72, Fed.R.Civ.P. "for reconsideration of the plaintiff's facial challenge to the constitutionality of the referenced Tennessee Collateral review statutes over which the Sixth Circuit has held this court has jurisdiction." (Docket Entry No. 14) The undersigned interprets the Order of referral to require a full reassessment of the plaintiff's remaining constitutional challenge under 28 U.S.C. §§ 1915(e)(2) and 1915A(b).

II. BACKGROUND

The plaintiff challenges the constitutionality of the following Tennessee statutes pertaining to state post-conviction/collateral review: Tenn.Code Ann. § 29-21-107 (*habeas corpus* procedures); [FN 1] Tenn.Code Ann. § 40-26-105 (writ of error *coram nobis*); Tenn.Code

Ann. § 40-30-107 (post-conviction proceedings); [FN 2] Tenn.Code Ann. § 40-30-117 (motions to reopen prior post-conviction proceedings). (Docket Entry No. 1, pp. 2, 32) According to the plaintiff, these statutes have barred him from pursuing late-arising constitutional challenges to his convictions in state court. (Docket Entry No. 1, pp. 1-2, 32)

> FN 1. Tenn.Code Ann § 29-21-107 pertains only to the contents of the writ and procedures to file it. The undersigned liberally construes the complaint to include a challenge to state *habeas corpus* procedures generally.

> FN 2. Tenn.Code Ann. § 40-30-107 pertains only to the preliminary Order entered by state courts if the petition is not dismissed following preliminary consideration. The undersigned liberally construes the complaint to include a challenge to the constitutionality of Tennessee's post-conviction procedures set forth in Tenn.Code Ann. 40-30-102.

*5 The plaintiff was convicted in 1982 on two counts of first-degree murder under Tenn.Code Ann. § 39-2402. (Docket Entry No. 1, p. 10, ¶ 17) The plaintiff's case became final on direct review on July 2, 1990. (Docket Entry No. 1, p. 10, ¶ 23) His unsuccessful petition for state post-conviction relief also concluded on appeal as of right that same date. [FN 3] (Docket Entry No. 1, p. 11, ¶ 25)

> FN 3. The Court of Criminal Appeals judgment on direct appeal was vacated and

> reentered on appeal from the judgment of the post-conviction court to permit the plaintiff to appeal to the Tennessee Supreme Court. *Carter v. State*, 1990 WL 9892 at * 1 (Tenn.Crim.App.).

The plaintiff asserts that, subsequent to direct appeal and disposition of his post-conviction review, the Tennessee Supreme Court clarified the "premeditation" and "deliberation" elements of Tenn.Code Ann. § 39-2402 [FN4] in *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992) (hereinafter "*Brown*"), holding in part that, without more, repeated blows or shots do not establish premeditation. (Docket Entry No. 1, p. 8 ¶ 20) The plaintiff avers that the Tennessee Supreme Court's decision in *Brown* was not available to him at the time of his direct appeal or post-conviction review. (Docket Entry No. 1, pp. 10-11, ¶¶ 23, 25)

> FN 4 Tenn.Code Ann. § 39-2402 was Tennessee's first-degree murder statute in effect at the time of the murders.

According to the plaintiff, the Tennessee Supreme Court's decision in *Brown* did not constitute grounds for him to reopen his original post-conviction proceeding. (Docket Entry No. 1, pp. 11-12, ¶¶ 26-27) Therefore, he filed in the White County Criminal Court a document that he describes as a "Untitled Motion/Petition." (Docket Entry No. 1, pp. 12-13, ¶ 28)

The plaintiff avers that the White County Criminal

Court dismissed the motion "without explanation." (Docket Entry No. 1, p. 13, ¶ 29) According to the plaintiff, he appealed but the Court of Criminal Appeals concluded that *Brown* was decided "well after [his] convictions became final," found that his claims were time barred, and denied his motion for a rehearing. (Docket Entry No. 1, p. 14, ¶¶ 30-31) The Court of Criminal Appeals affirmed the judgment of the White County Criminal Court, and the Tennessee Supreme Court denied his application for permission to appeal. (Docket Entry No. 1, p. 14, ¶¶ 31-33)

The plaintiff claims that he filed a second "Untitled Motion/Petition" this time in the Johnson County Criminal Court. (Docket Entry No. 1, pp. 16-17, ¶ 34) According to the plaintiff, the Johnson County Criminal Court dismissed the action, reasoning that "federal constitutional claims we[re] not cognizable as a ground for relief under Tennessee's law of habeas corpus in Tenn.Code Ann. §§ 29-21-107(b)(2), (3), (4)." (Docket Entry No. 1, pp. 16-17, ¶ 35) The plaintiff asserts that the Court of Criminal Appeals affirmed the judgment of the Johnson County Criminal Court for the same reasons. (Docket Entry No. 1, pp. 17-18, ¶¶ 36-38) Again, the Tennessee Supreme Court denied the plaintiff's application for permission to appeal. (Docket Entry No. 1, p. 18, ¶ 39)

The crux of the plaintiff's constitutional challenge to the statutes at issue is that, "[s]ince the *clarification* of § 39-2402 in *Brown*, no Tennessee court has reviewed the legitimacy of [his] convictions." (Docket Entry No. 1, p. 9, ¶ 21) According to the plaintiff, the

inability to challenge his conviction in state court post-*Brown* has resulted in the continued imprisonment of someone who is "factually innocent," and has violated his rights under the First, Eighth, and Fourteenth Amendments. (Docket Entry No. 1, pp. 8-9, ¶ 20

III. ANALYSIS

*6 To state a claim under § 1983, the plaintiff must allege and show: 1) that he was deprived of a right secured by the Constitution or laws of the United States; and 2) that the deprivation was caused by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1982) (overruled in part by *Daniels v. Williams*, 474 U.S. 327, 330 106 S.Ct. 662, 88 L.Ed.2d 662 1986)); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Black v. Barberton Citizens Hosp.*, 134 F.3d 1265, 1267 (6th Cir. 1998). Both parts of this two-part test must be satisfied to support a claim under § 1983. *See Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. 1991).

Under the Prison Litigation Reform Act (PLRA), the Court is required to dismiss a prisoner-plaintiff's complaint if it is determined to be frivolous, malicious, of if it fails to state a claim on which relief may be granted. 28 U.S.C. § 1915A(b). A complaint is frivolous and warrants dismissal when the claims "lack[ ] an arguable basis in law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Claims lack an arguable basis in law or fact if they contain factual allegations that are fantastic or delusional, of if they are based on legal

theories that are indisputably meritless. *Id.* at 327-28; *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000; *see also Lawler v. Marshall*, 898 F.2d 1196, 1198-99 96th Cir. 1990). Although pro se complaints are to be construed liberally by the courts, *see Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982), under the PLRA, "courts have no discretion in permitting a plaintiff to amend a complaint to avoid a *sua sponte* dismissal," *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997).

A. Plaintiff's Standing to Challenge the Statutes at Issue

The threshold requirement in any federal civil action is a "case" or "controversy," as defined in Article III § 2 of the U.S. Constitution, brought by a plaintiff who has "standing" to raise the issue. To satisfy the requirement for standing under Article III, § 2, the plaintiff must show that: 1) he suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendants; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 527 U.S. 167, 180-81, 120 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "[T]he 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248

(2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). "[T]he doctrine of standing presents an insuperable jurisdictional obstacle." *Massachusetts*, 127 S.Ct. at 1453.

***7** As previously noted, *supra* at p. 4, the plaintiff alleges that, "[s]ince the *clarification* of § 39-2402 in *Brown*, *no Tennessee court* has reviewed the legitimacy of [his] convictions." (emphasis added) The alleged "injury in fact" here is that Tennessee's post-conviction/collateral relief statutes have barred the plaintiff from challenging his conviction post-*Brown*. To establish standing on the grounds alleged, the plaintiff must make a threshold showing that the statutes at issue have, in fact, prevented him from challenging his conviction in a post-conviction/collateral review proceeding based on the Tennessee Supreme Court's "clarification" in *Brown*.

In his complaint, the plaintiff refers the Court to *Carter v. State*, M2004-03073-CCA-R3-CO, 2006 WL 119673 (Tenn.Crim.App.). (Docket Entry No. 1, p. 12 ¶ 28) In that 2006 opinion, the Court of Criminal Appeals refers to *Carter v. Carlton*, No. E2000-00496-CCA-R3-PC, 2001 WL 170878 at * 1 (Tenn.Crim.App.), writing:

> Finally, the petitioner argues that he is entitled to a new trial because the Tennessee Supreme Court clarified the law regarding the elements of first-degree murder in *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992). *This issue was previously addressed in the petitioner's post-conviction proceeding. See John E. Carter v. Howard Carlton, 2001 WL*

*170878 at * 3.*

Carter, 2006 WL at * 4 (italics in original) (emphasis added). Although the 2006 opinion refers to the 2001 opinion as pertaining to the plaintiff's post-conviction review, the 2001 opinion actually pertained to a state *habeas corpus* proceeding.

In the 2001 opinion, the Court of Criminal Appeals described the issue raised by the plaintiff on collateral review as follows:

> The petitioner claims that the indictment failed to give him adequate notice of the charges and that the relevant criminal statute was unconstitutionally vague because the courts at the time did not properly distinguish between the elements of premeditation and deliberation. A claim relating to the deficiency of the charge, if true, would deprive the trial court of jurisdiction over the petitioner, and therefore, would be a proper issue for habeas corpus litigation.

Id. at * 1 (emphasis added). In deciding this issue on the merits, the Court of Criminal Appeals wrote:

> This leads us to the third component of Carter's notice issue, that the cace law lacked clear definitions of premeditation and deliberation. *It is true, as the petitioner alleges, that historically the case law has not been uniform in its treatment of the definitions of premeditation and deliberation. See e.g.,*

> *State v. Brown, 836 S.W.2d 530, 540-43 (Tenn. 1992)* (discussing various approaches to analysis [sic] of premeditation and deliberation*). Although the supreme court has since addressed the ambiguity by clarifying the distinction between the two elements, see generally id. at [sic] 543, we have held time and again that the former ambiguity failed to rise to the level of depriving defendants of their constitutional rights. In fact, we have consistently held just the opposite.* Without some indication that any ambiguous judicial interpretations of the terms premeditation and deliberation were so serious as to implicate constitutional concerns, *we do not conclude that an individual convicted of first degree murder pre-Brown is laboring under a void conviction.*

*8 *Id.* at * 3 (some internal citations omitted) (emphasis added). Notwithstanding his claim to the contrary, it is clear from the foregoing that the plaintiff's challenge to his convictions under *Brown* has, in fact, been addressed in a state collateral review proceeding. Given that his claim under *Brown* has been addressed on collateral review, the plaintiff cannot demonstrate an "injury in fact" based on his claim that "no Tennessee court has reviewed the legitimacy of [his] convictions" since *Brown* was decided.

Because the plaintiff lacks standing to challenge the statutes at issue, the complaint is subject to dismissal for want of jurisdiction. On the other hand, were it determined that the plaintiff had

standing to challenge the constitutionality of the statutes at issue, because the plaintiff has lied to the Court, his complaint is subject to dismissal as malicious.

B. Statute of Limitations

Federal courts apply the state personal injury statute of limitations in § 1983 actions. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia*, 471 U.S. 261, 280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (superseded by statute on other grounds as recognized in *Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369, 379-80, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004)). The statutes of limitations for personal injury arising in Tennessee is one year. Tenn.Code Ann. § 28-3-104(a)(3); *Roberson v. Tennessee*, 399 F.3d 792, 794 (6th Cir. 2005); *Dellis v. Corrs. Corp. Of Am.*, 257 F.3d 508, 511 (6th Cir. 2001).

Although the duration of the statute of limitations is governed by state law, federal standards govern when the statute begins to run. *See Wilson*, 471 U.S. at 267; *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1986). The statute of limitations begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 857 (6th Cir. 2003); *see also Kelly v. Burks*, 415 F.3d 558, 561 (6th Cir. 2005); *Roberson*, 399 F.3d at 794. This inquiry is objective and the court looks "to what even should have alerted the typical lay person to protect his or her rights." *Hughes v. Vanderbilt University*, 215 F.3d 543, 548 (6th Cir. 2000).

In the complaint, the plaintiff asserts that he filed an "Untitled Motion/Petition" in the White County Criminal Court. (Docket Entry No. 1, pp. 12-13, ¶¶ 28-29) The text of the motion quoted in the complaint includes the following "independent" claim for relief:

> If Tennessee law does not provide an adequate corrective process ... [then] Petitioner presents this 'Untitled Motion/Petition' as an independent action asserting the denial of his federal constitutional guarantees. U.S.Const.Amend. 5, 6, 8 & 14; U.S.Const.Art. I, § 9, cl. 2.

(Docket Entry No. 1, p. 13, ¶ 28) It is clear from the statement above that the plaintiff was aware of the federal dimension of the claim presently before the district court at the time he filed the motion in the White County Criminal Court. The question is, When did he file that motion?

***9** The plaintiff refers the Court to *Carter*, 2006 WL 119673, *supra* at p. 6, in connection with the motion that he filed in the White County Criminal Court. (Docket Entry No. 1, p. 12 ¶ 28) Review of the Appeals identified three separate "petitions" for writs of error *coram nobis* before it on consolidated appeal, each petition having a different filing date -- July 23, 2002, March 1, 2004, and December 6, 2004. Id. at * 1.

Given that the 2006 opinion is the one to which the plaintiff refers in connection with the motion that he filed in the White County Criminal Court, then one

of the three filing dates identified by the Court of Criminal Appeals must be the date that the plaintiff filed the motion in question. Since it cannot be determined which of the three dates pertains, the undersigned assumes that it was the motion filed latest in time, *i.e.*, the one filed on December 6, 2004.

The plaintiff did not "file" this action until May 19, 2007. [FN 5] Giving the plaintiff the benefit of the doubt that he filed the motion as late as December 6, 2004, he brought this action nearly one and one-half years after the one-year statute of limitations had run. The next question is whether this action is barred by the statute of limitations.

> FN 5. The envelope in which the plaintiff originally mailed his complaint to the district court is stamped as having been received in the prison mailroom on May 19, 2007. This is the date that the plaintiff is deemed to have filed his complaint. *See Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002).

The statute of limitations may, of course, be tolled in actions alleging civil rights violations. *See Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988). The Supreme Court also has recognized the doctrine of equitable tolling in civil rights cases, holding that statutory filing deadlines "should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 397, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Rather, the statutory filing deadlines are more analogous to a limitations statute, "subject to waiver as well as tolling when equity so requires ...."

Id. at 398.

Although the statute of limitations is subject to equitable tolling, the plaintiff does not assert, nor can it be liberally construed from the complaint, that the statute of limitations should be tolled in this case for reasons of equity, or otherwise. Accordingly, the undersigned concludes that equitable tolling is not warranted.

Because the plaintiff filed his complaint challenging the constitutionality of the statutes at issue beyond the one-year statute of limitations, his complaint is subject to dismissal for frivolity. *Dellis*, 257 F.3d at 511 (claims filed beyond the statute of limitations are subject to dismissal as frivolous).

C. Plaintiff's Challenge to the Constitutionality of Tennessee's Post-Conviction/Collateral Review Statutes

As previously established, *supra* at p. 4, the thrust of the plaintiff's complaint is that Tennessee's post-conviction/collateral review statutes have barred him from challenging his convictions in state court post-*Brown*. The fact is, however, the plaintiff has no constitutional right to post-conviction/collateral review. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402-03, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)); *see also Jergens v. Brigano*, No. 98-3962, 1999 WL 1204804 (6th Cir. (Ohio)) ("[T]here is no constitutional right to any state post-conviction process at all ...."). More particularly, the plaintiff cannot support a claim that Tennessee's post-

conviction/collateral review statutes violate his constitutional rights where no right to post-conviction/collateral review exists in the first place.

*10 The plaintiff refers to himself repeatedly as "factually innocent," or "actually innocent," arguing at length that his alleged innocence gives him a constitutional right to challenge his conviction under Brown in a state post-conviction/collateral review proceeding. (Docket Entry No. 1, pp. 18-32, ¶¶ 40-55) As a matter of clarification, actual or factual innocence means that the plaintiff did not commit the crime. *Bousley v. Untied States*, 523 U.S. 614, 623-24, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). The plaintiff does not allege, nor can it be liberally construed from the complaint, that he did not commit the double-murder of which he was convicted. On the contrary, the plaintiff's complaint is premised solely on technical/legal innocence, *i.e.*, that the proof at trial to establish premeditation was inconsistent with the Tennessee Supreme Court's later "clarification" in Brown. None of the cases to which the plaintiff cites in support of his argument, analyzed below, [FN 6] establishes that he has a constitutional right to challenge his convictions under *Brown* in a state post-conviction/collateral review proceeding based on a claim of legal or technical innocence. Nor has the undersigned's research uncovered any such law.

> FN 6. *Bousley*, 523 U.S. at 614 (actual innocence at issue, not legal innocence); *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) (innocence not an issue); *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct.

2641, 162 L.Ed.2d 480 (2005) (dicta pertaining to actual innocence under 28 U.S.C. § 2244(b)(2)); *Bunkley v. Florida*, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003) (actual change in the law at issue, not a "mere clarification" as was the case under *Brown*); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (due process and adequacy of evidence at trial); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (decided on direct review not collateral review); *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (actual innocence is the gateway through which federal habeas petitioner must pass to excuse procedural default); *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) (actual innocence is gateway through which federal habeas petitioner must pass to excuse procedural default); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (a showing of "actual innocence" is required to avoid procedural bar); *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (Texas child support case inapplicable to this action); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed.2d 1078 (1923) (state rights actions dismissed for want of jurisdiction); *Bailey & Robinson v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (criminal action on direct appeal, not collateral review); *Triestman v. United States*, 124 F.3d 361 (2nd Cir. 1997) (denying second/successive motion under § 2255, the required showing being "actual

innocence" rather than "legal innocence," and hold that *Bailey & Robinson v. United States* did not establish a new constitutional right); *In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997) (a prisoner may seek habeas relief under 28 U.S.C. § 2241 where there has been an intervening change in the substantive law); *Wyzykowski v. Department of Corrections*, 226 F.3d 1213 (11th Cir. 2000) (showing of "actual innocence" is ground to excuse an untimely petition); *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998) (innocence not an issue in determining that the AEDPA's one-year limitations period not unconstitutional); *Holloway v. Jones*, 116 F.Supp.2d 1185 (E.D.Mich. 2001) (no grounds to excuse procedural default where there was no showing of "actual innocence"); *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) (claim of innocence not an issue); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (pre-AEDPA case overruled by 28 U.S.C. § 2253(c)(2)); *Daniels*, 474 U.S. at 327 (dicta in § 1983 case inapplicable to this action); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (dicta in assisted suicide case inapplicable to this action); *Hurtado v. California*, 110 U.S. 516 (1884) (pre-AEDPA case inapplicable to this case); *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (§ 1983 case inapplicable to this action); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (employment discrimination case inapplicable

to this action); *Michael v. Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955) (direct appeal pertaining to criminal defendant's rights at trial); *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (direct appeal pertaining to a criminal defendant's rights at trial); *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (social security cases inapplicable to this action); *Slate v. State*, 1994 WL 149170 (Tenn.Crim.App.) (affirming post-conviction court's decision not to grant relief under *Brown*); *Jackson v. State*, 1995 WL 747843 (Tenn.Crim.App.) (affirming post-conviction court decision not to grant relief under *Brown*); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (bar to execution of the mentally ill is a new constitutional ruling warranting retroactive application on collateral review); *In re Adoption of E.N.R.*, 42 S.W.3d 26 (Tenn. 2001) (family law case inapplicable to this action); *Veach v. State*, 491 S.W.2d 81 (Tenn. 1973) (dicta in DUI case inapplicable to this action); *State v. Taylor*, 992 S.W.2d 941 (Tenn. 1999) (dicta on direct appeal of community corrections case unrelated to this case); *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999) (dicta in criminal case on direct appeal where outdated jury forms were used at trial); *State v. Ratliff*, 71 S.W.3d 291 (Tenn.Crim.App. 2001) (case on direct appeal in criminal case where a petition for a writ of error coram nobis was filed prior to filing a direct appeal).

For the reasons explained above, the plaintiff's claim

that Tennessee's statutes governing post-conviction/collateral review violate his constitutional rights lacks an arguable basis in law or fact. Accordingly, the plaintiff's constitutional challenge to the statutes at issue is subject to dismissal as frivolous for this reason as well.

D. The Named Defendants

Finally, the defendants to this action are state criminal court judges, judges of the Court of Criminal Appeals, and justices of the Tennessee Supreme Court. The plaintiff identifies all but Judge Thomas T. Woodall in the statement of the facts. As to those judges and justices whose actions are described in the complaint, the plaintiff's only apparent allegation is that, acting within the scope of their judicial responsibilities, they enforced facially constitutional statutes duly enacted by the Tennessee legislature.

Although state court judges are not immune from suit where, as here, only declaratory relief is sought, *see Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984); *Sevier v. Turner*, 742 F.2d 262, 269 (6th Cir. 1984), to be successful in this § 1983 action, the plaintiff still must establish that the defendants acted knowingly or intentionally to violate his constitutional rights. *Ahlers v. Schebil*, 188 F.3d 365, 373 (6th Cir. 1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The plaintiff does not allege, nor can it be liberally construed from the complaint, that the defendants acted knowingly or intentionally to violate his rights under the Constitution or laws of the United States. Nor can such an inference be drawn from the fact that the only acts attributed to

the defendants are that they upheld the law of the State of Tennessee. Accordingly the plaintiff has failed to satisfy the first part of the two-part test under *Parratt, supra* at p. 4

*11 As reasoned above, the plaintiff's claims against the named defendants to this action lack an arguable basis in law or fact. Accordingly, this action is, once again, subject to dismissal as frivolous.

IV. CONCLUSION

For the reasons explained above, the undersigned RECOMMENDS that this action be DISMISSED for lack of standing/want of jurisdiction, and as both malicious and frivolous under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A. The undersigned further RECOMMENDS that any appeal NOT be certified under 28 U.S.C. § 1915(a)(3) as taken in good faith.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from service of this Report and Recommendation (R & R) within which to file with the district court any written objections to the proposed findings and recommendations made herein. Any party opposing shall have ten (10) days from receipt of any objections filed regarding this R & R within which to file a response to said objections. Failure to file specific objections within the time frames specified may constitute a waiver of further appeal of this R & R . *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), *rehearing denied*, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986).

ENTERED this the 8th day of July, 2008.

* This document is not available to Petitioner for reproduction. This Appendix was retyped by Your *pro se* Petitioner to be in compliance with U.S.Sup.Ct. Rule 33. It represents a true and accurate reproduction of the original document to the best of Petitioner's ability.

Court of Criminal Appeals of Tennessee, at Knoxville.

John E. CARTER,
v.
Howard CARLTON.

No. E2000-00406-CCA-R3-PC.
Feb. 22, 2001.

Appeal Denied July 2, 2001.

Appeal Denied Sept. 17, 2001.

Appeal from the Criminal Court for Johnson County, No. 3360; Robert E. Cupp, Judge.

John E. Carter, pro se.

Paul G. Summers, Attorney General & Reporter; Patricia C. Kussman, Assistant Attorney General; Joe C. Crumley, Jr., District Attorney General, for appellee, Howard Carlton.

WITT, J., delivered the opinion of the court, in which TIPTON and SMITH, JJ., joined.

OPINION

WITT.

**1 John E. Carter seeks the writ of *habeas corpus*. He claims that he is entitled to immediate release from his two 1981 convictions for the first degree murder of his grandparents. Carter

alleges that he is being illegally restrained because he had inadequate notice of the charges against him, because the trial court excluded relevant evidence at his trial, and because the jury instructions given at his trial were flawed. We agree with the court below that these issues do not entitle Carter to issuance of the writ of *habeas corpus*. Accordingly, we affirm the lower court's dismissal of the petition.

John E. Carter appeals from the Johnson County Criminal Court's denial of his petition for the writ of *habeas corpus*. Carter is presently serving consecutive life sentences for his two convictions of first degree murder resulting from the killings of his grandparents in White County. *See State v. John E. Carter,* no number (Tenn.Crim.App., Nashville, Feb. 20, 1985). In his petition, he complains that he did not have proper notice of the charges against him, that the trial court erroneously excluded evidence at his trial, and that the jury instructions given at his trial were not an accurate statement of the law. Upon review, we hold that there is no deficiency of notice and that the remaining issues are not cognizable in *habeas corpus* proceedings. Accordingly, we affirm the lower court's dismissal of the petition.

Habeas corpus relief is very limited because it is only available when " 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." *Archer v. State,* 851 S.W.2d 157, 164 (Tenn.1993)

(quoting *State v. Galloway,* 45 Tenn. (5 Cold.) 326, 336-37 (Tenn.1868)); *see State v. Ritchie,* 20 S.W.3d 624, 630 (Tenn.2000). In other words, except for cases of expired sentences, *habeas corpus* relief is granted only when a judgment is void. *Ritchie,* 20 S.W.3d at 630-31. "A void judgment is one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment." *Dykes v. Compton,* 978 S.W.2d 528, 529 (Tenn.1998) (citing *Archer,* 851 S . W.2d at 161); *see Ritchie,* 20 S.W.3d at 630. Thus, the office of a *habeas corpus* petition, in contrast to a post-conviction petition, is to contest void, not merely voidable, judgments. *Archer,* 851 S.W.2d at 163-64. If a court rendering judgment has jurisdiction of the person and the subject matter, as well as the authority to make the challenged judgment, any such judgment is voidable rather than void, and therefore, *habeas corpus* relief will not lie. *Passarella v. State,* 891 S.W.2d 619, 627 (Tenn.Crim.App.1994).

We must first determine if the allegations made by the petitioner may be reviewed in a *habeas corpus* proceeding. The petitioner claims that the indictment failed to give him adequate notice of the charges and that the relevant criminal statute was unconstitutionally vague because the courts at the time did not properly distinguish between the elements of premeditation and deliberation. A claim relating to the deficiency of the charge, if true, would deprive the trial court of jurisdiction over the petitioner, and therefore, would be a proper issue for *habeas corpus* litigation. *See Dykes,* 978 S.W.2d at 529. Further, Carter's claim that the criminal statute was unconstitutionally vague, if correct, has

the potential to render his convictions void, and therefore, the issue is properly raised in a *habeas corpus* proceeding. *See Jimmy Wayne Wilson v. State,* No. 03C01-9806-CR-00206, slip op. at 12 (Tenn.Crim.App., Knoxville, June 24, 1999); *see also State v. Dixon,* 530 S.W.2d 73, 74-75 (Tenn.1975) (an unconstitutional statute is void from the date of its enactment and cannot form the basis for a valid conviction, although prior version of statute may save conviction from voidness). Thus, the sufficiency-of-notice issue may be a proper one for *habeas corpus* relief.

**2 However, the remaining issues are not cognizable in a *habeas corpus* proceeding. Neither erroneous evidentiary rulings nor defective jury instructions affect the jurisdiction or authority of the trial court to pronounce judgment. Therefore, these issues were not properly before the lower court and are not properly before this appellate court. *See State v. Henderson,* 640 S.W.2d 56, 57 (Tenn.Crim.App.1982) (*habeas corpus* proceeding not proper action in which "to review or correct errors of law or fact committed by the trial court in the exercise of its jurisdiction").

Thus, we return to the sufficiency-of-notice issue. The indictments charged as follows

> Therefore, on or about the 27th day of June, 1981, in the County and State aforesaid [the defendant] did unlawfully, feloniously, willfully, deliberately, premeditatedly, and maliciously make an assault upon the body of one [victim] and then and there did

> unlawfully, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought kill and murder the said [victim] in violation of Section 39-2402 TCA, and against the peace and dignity of the State of Tennessee.

In a tortured argument, Carter alleges that the indictment and proscriptive statute failed to give him sufficient notice because the appellate courts at the time did not distinguish between the elements of premeditation and deliberation as required under the then-existing first degree murder statute. *See* Tenn.Code Ann. § 39-2402 (Supp.1981) (recodified at § 39-2-202) (repealed 1989). Therefore, Carter reasons, he could not know the nature and cause of the accusation against him.

In order to analyze this abstruse argument, we begin with the adequacy of the indictment itself. The state and federal constitutions require that an accused be informed of the nature and cause of the accusation against him. *See* U.S. Const. amend. VI, XIV; Tenn. Const. art. I, § 9; *State v. Hill,* 954 S.W.2d 725, 727 (Tenn.1997). "Generally stated, an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." *Hill,* 954 S.W.2d at 727 (citations omitted); *see Dykes,* 978 S.W.2d at 530 (applying *Hill* analysis to pre-1989 crime). At the time of the petitioner's crime, the Code required

> The indictment must state the facts

> constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are such words as "force and arms" or "contrary to the form of the statute" necessary.

Tenn.Code Ann. § 40-1802 (1975) (repealed 1989).

In the case at bar, the language of the indictment sufficiently charges the offense of first degree murder as it existed at the time. The language, which both identifies the elements of the crimes charged and references the pertinent statute, is sufficient to notify a reasonable person of the crimes with which he is charged, to allow the court upon conviction to pronounce the proper judgment, and to protect the person charged from twice being placed in jeopardy for the same offense. *See Hill,* 954 S.W.2d at 727. Thus, there is no deficiency in the language of the indictment itself.

**3 As a further component of the overall lack-of-notice claim, Carter alleges that former Code section 39-2402, upon which his convictions were premised, was unconstitutionally vague because it failed to delineate the distinction between the elements of premeditation and deliberation. The former statute reads in pertinent part, "Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful,

deliberate, malicious, and *premeditated* killing ... is murder in the first degree." Tenn.Code Ann. § 39-2402(a) (Supp.1981) (recodified at § 39-2-202) (repealed 1989) (emphasis added). The statute clearly requires premeditation and deliberation as elements of the crime. We see no vagueness or ambiguity in the statute simply because it does not define the challenged terms, and the petitioner has cited no authority which would require such. Indeed, it is common for a criminal statute to contain terms which are defined elsewhere, whether in the Code or by caselaw. *See, e.g.,* Tenn.Code Ann. § 39-11-106 (defining terms used in the Criminal Code, some of which are elements of crimes); *State v. Tony Fitz,* 19 S.W.3d 213 (Tenn .2000) (defining "violence" for purposes of Code section 39-13-401, robbery statute).

This leads us to the third component of Carter's notice issue, that the caselaw lacked clear definitions of premeditation and deliberation. It is true, as the petitioner alleges, that historically the caselaw has not been uniform in its treatment of the definitions of premeditation and deliberation. *See, e.g., State v. Brown,* 836 S.W.2d 530, 540-43 (Tenn.1992) (discussing various approaches to analysis of premeditation and deliberation). Although the supreme court has since addressed the ambiguity by clarifying the distinction between the two elements, *see generally id.* at 543, we have held time and again that the former ambiguity failed to rise to the level of depriving defendants of their constitutional rights. *See, e.g., Lofton v. State,* 898 S.W.2d 246, 249-50 (Tenn.Crim.App.1994); *State v. Ray,* 880 S.W.2d 700, 707 (Tenn.Crim.App.1993). In fact, we have consistently held just the opposite. *See,*

e.g., Lofton, 898 S.W.2d at 249-50; *Ray,* 880 S.W.2d at 707. Without some indication that any ambiguous judicial interpretations of the terms premeditation and deliberation were so serious as to implicate constitutional concerns, we do not conclude that an individual convicted of first degree murder pre-*Brown* is laboring under a void conviction.

Thus, the indictment adequately charged the defendant with two counts of first degree murder, the first degree murder statute was not unconstitutionally vague, and any ambiguities in the caselaw regarding the definitions of the elements of premeditation and deliberation have not been shown to be so serious as to render the notice deficient. As a result, we cannot conclude that Carter received inadequate notice of the offenses with which he was charged and ultimately convicted. He is not entitled to the writ of *habeas corpus.*

**4. For these reasons, the judgment of the trial court is affirmed.